No. 15,541

IN THE

United States Court of Appeals

For the Ninth Circuit

ANK OF NEVADA,
Appellant,

vs.

NITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Nevada.

APPELLANT'S REPLY BRIEF.

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JURISDICTION.

The statements of jurisdiction contained in Appellant's and Appellee's briefs adequately set forth the jurisdiction of this Court to entertain this appeal.

STATEMENT OF CASE.

The facts of the case are fully set forth in the Brief of Appellant at pages two (2) to five (5) thereof, and in the Brief of Appellee at pages three (3) to seven (7) thereof.

However, it is noted that the bank statements d the taxpayer, J. D. Bentley's checking account (.. 22-27), indicate that on April 16, 1955, the same da as the execution of the demand promissory note i question, the sum of $2,000.00 was deposited to te taxpayer's account, which was the identical sum s that borrowed and evidenced by said note.

SUMMARY OF ARGUMENT.

The position of the Appellant is, and consisten y has been, that it was not in the possession of any pro- erty belonging to the taxpayer-depositor which vas subject to the tax levy upon it by the collector. Tis contention is based upon the demand promissory nte dated April 16, 1955, executed by the taxpayr- depositor to the appellant bank, (R. 19) and upon ie special contract entered into by and between the p- pellant and the taxpayer-depositor which was da'd August 31, 1954 (R. 17-18) and subsequently renev'd (R. 20-21), giving the appellant the right to set off the taxpayer-depositor's account against any indebtd- ness owing to the bank.

The appellee in its reply brief takes the positon that this right of set off possessed by the appellnt was an inchoate and merely potential right to apply the funds of the taxpayer-depositor to any indeb'd- ness owing to the appellant (B. 8). It is furter contended by the appellee that it isn't even clear hat

ıe appellant bank exercised its right of set off, (B.) at the time of the levy and that the appellant could ot validly exercise this right in the absence of a ıowing that the taxpayer-depositor cannot, or will ot, pay or that the appellant had no other practical gal remedy to recover this indebtedness (B. 10).

The contentions of the appellee, based upon the ıcts in this case, in the opinion of the appellant, are early against the evidence and the law as will be sclosed by the argument to follow:

ARGUMENT.

IERE IS NO PROPERTY OF THE TAXPAYER-DEPOSITOR IN THE POSSESSION OF THE APPELLANT SUBJECT TO A TAX LIEN.

It is submitted by the Appellant that the procedure levy by the collector upon the deposit of the tax- ıyer with the appellant bank was proper, however, is contended by the appellant bank that this at- mpted levy and procedure in essence should be eated in all respects as nothing more than a garnish- ent of the bank account by the collector. *United ates v. Bank of United States,* 5 F. Supp. 942. In ıs respect it is clear and established law that the ghts of the garnisher do not rise above or beyond ose of his depositor, as stated by Mr. Justice Jack- n in the case of *No. Chicago Rolling Mill Co. v. egon & Steel Co.,* 152 U.S. 596, 14 Sup. Ct. 710.

The rights of the bank to a set off may depend upon e law of the particular state or upon any particular

specific arrangements which it may have made wit its depositor. As has been set out by the case of th *United States v. Bank of United States,* 5 F. Sup 942, wherein the facts are similar in all respects to th instant case, and the court followed the above pri ciple and held that the rights of the collector cou not rise above those of the depositor upon which h attempted to levy. It is contended by the appella that in the instant case these specific arrangemen with the depositor were covered by the agreemet entered into on the 31st day of August, 1954 (R. 1- 18) and renewed subsequently thereto (R. 20-21. This right of set off possessed by the appellant was perfected right and existed at all times materil hereto. It is clear from this agreement that it ws intended by the appellant and the taxpayer-depositr that the bank should have this perfected right at te time of the execution of the agreement and in ths respect it was intended that the account of the ta- payer should at all times be security for any indebte- ness which the taxpayer might have owed to the appl- lant bank.

It is clear from the case of *United States v. Winett*, 165 F. 2d 149, that such a right of set off y agreement is a perfected right which becomes so upn the date of the execution of the agreement, and tht the mere exercise of the rights upon this agreemat sometime subsequent to the time of execution in no way affects the validity of the agreement entered ino.

It is therefore the contention of the appellant tat the only method by which it can be determind

ether the appellant was in possession of the prop-
ty of the taxpayer-depositor subject to a levy, as
the case of a bank deposit, is by deducting the
bits from the credits, and the sum left in favor of
e depositor was the balance or property subject to
e tax lien. This is true whether the debits are out-
nding checks or created by agreements. Certainly
e depositor could not reach or obtain any sums from
s bank account, in the instant case, without the
proval of the appellant, and the levy of the appellee
uld likewise attach to only the credits to which the
xpayer-depositor had an unqualified right.

THE APPELLANT EXERCISED ITS RIGHT OF SET OFF AT THE TIME OF THE LEVY.

It has been stated by the appellee in its brief that
is not clear that the appellant bank actually exer-
sed any set off, (B. 9). Such a conclusion is clearly
ainst the evidence, as it appears from the evidence
at the bank on June 10, 1955, at the time of the
vy by the collector, exercised its right of set off to
e balance remaining in the taxpayer-depositor's ac-
unt (R. 26). In fact, the evidence shows that the
pellant bank had exercised its option of set off
ainst the taxpayer-depositor's account in the sum
$878.16, at that time the taxpayer-depositor had an
erdraft of $648.45, and subsequent deposits in the
m of $668.45 had been made to this account (R. 26)

which created a balance of $20.00 to the credit of te taxpayer-depositor.

The fact that the appellant did not exercise s option of set off to the total sum of $1500.00, whih was the balance then due on the demand note executd on April 16, 1955, at the time of the levy is, of cour, immaterial in view of the fact that by so doing te appellant would have waived any possibility of :- covering at a later date the difference between te sum of $878.16, which was applied as set off and te actual balance then due upon the balance of the ne in the amount of $1500.00.

THE RIGHT OF SET OFF BY THE APPELLANT IS NOT BASD UPON THE FACT THAT THE DEPOSITOR CANNOT OR WL NOT PAY THE OBLIGATION OWED TO THE CREDITOR.

The true basis of the right of set off possessed y the appellant is not insolvency of the taxpayr-depositor or the lack of another remedy by the appllant to collect indebtedness owing from the taxpayr-depositor to the appellant, but rather rests upon ne principle that as the depositor is indebted to the bak upon a demand which is due, the funds in its possession may properly and justly be applied in paymat of such indebtedness, and it has, therefore, a rit to retain such funds until payment is actually mae.

Another reason given for this lien, or set off, is ne fact that the bank gives credit to the depositor y allowing overdraft, or permitting notes or bills to become overdue on the faith of the bank deposit tn

its hands, which it can then apply to the payment its debt then past due. *Michie on Banks and Banking,* Volume 5A, Chapter 9, Section 114. It is not necessary for any formal proceeding on the part of the bank to entitle the bank to the benefit of a set off against a customer's deposit therein in the payment of his indebtedness to the bank.

It appears from the record that the deposit of $000.00 upon which the collector attempted to levy was created by and out of the same transaction with the loan evidenced by the note, and the funds from the promissory note executed to the appellant bank were deposited in the taxpayer-depositor's account at the time of the execution of the note (R. 22). In this respect the debts were joined together in origin, the debit being produced by the credit. It is clear that where debts in origin and in equity are joined together and arise out of the same transaction, the bank has the right in equity to set off the note which produced the credit, regardless of special agreement. *United States v. Bank of Shelby,* 68 Fed. 2d 538.

It is, therefore, the contention of the appellant that the appellant properly and validly exercised its right to set off the credit which produced the debt against the taxpayer-depositor's account.

CONCLUSION.

For the reasons stated herein, appellant respectfully submits a decree should issue, setting aside and reversing the opinion and judgment of the lower court entered therein.

Dated, September 25, 1957.

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